

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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KIMBERLY BONNELL, individually
and as Special Administrator to the
ESTATE OF MARY HAYDUCKA;
NELSON HAYDUCKA, individually,

2:08-CV-00910-PMP-LRL

Plaintiffs,

vs.

ORDER

CABO AZUL RESORT, a timeshare resort;
owned by PACIFIC MONARCH RESORT,
INC., which is a registered foreign
corporation in the State of Nevada, doing
business in Nevada; RESORT,

Defendants.

Before the Court for consideration is Defendant's fully briefed Motion to Dismiss Based Upon the Doctrine of Forum Non Conveniens, and Motion to Establish Choice of Law (Doc. #28). The Court conducted a hearing on Defendant's Motion on August 3, 2010.

The Court finds that the issues raised in Defendant's Motion are premature and must await the completion of discovery in this case. Additionally, the Court's ultimate determination regarding choice-of-law will have a significant impact on the question of whether Defendant's Motion to Dismiss on the Doctrine of Forum Non Conveniens. Nonetheless, preliminary discussion of choice-of-law factors may be helpful to the parties in this proceeding.

1 In General Motors Corp. v. Eighth Judicial Dist. Ct. of State of Nev. ex rel.
 2 County of Clark, the Nevada Supreme Court adopted the Second Restatement's most
 3 significant relationship test for tort actions, "unless another, more specific section of
 4 the Second Restatement applies to the particular tort." 134 P.3d 111, 116 (Nev.
 5 2006). The Second Restatement specifically addresses wrongful death and personal
 6 injury actions, pursuant to which, "the local law of the state where the injury
 7 occurred determines the rights and liabilities of the parties, unless, with respect to the
 8 particular issue, some other state has a more significant relationship under the
 9 principles stated in § 6 to the occurrence and the parties, in which event the local law
 10 of the other state will be applied." Restatement Second of Conflicts of Law § 146; §
 11 175. Pursuant to § 6, the Court should consider the following principles:

12 (a) the needs of the interstate and international systems, (b)
 13 the relevant policies of the forum, (c) the relevant policies of
 14 other interested states and the relative interests of those states in
 15 the determination of the particular issue, (d) the protection of
 16 justified expectations, (e) the basic policies underlying the
 17 particular field of law, (f) certainty, predictability and uniformity
 18 of result, and (g) ease in the determination and application of the
 19 law to be applied.

20 Restatement § 6. "These principles are not intended to be exclusive and no one
 21 principle is weighed more heavily than another." General Motors Corp., 134 P.3d at
 22 117.

23 Here, the parties agree that the actual injury occurred in Mexico. Thus, the
 24 issue turns on whether Nevada has a more significant interest than Mexico in light of
 25 § 6 principles.

26 (a) the needs of the interstate and international systems

According to the Comments following the Restatement § 6,
 "[c]hoice-of-law rules, among other things, should seek to further harmonious
 relations between states and to facilitate commercial intercourse between them."

1 Applying Nevada law would potentially hinder commercial intercourse between
2 Mexico and Nevada if one was to assume that there exists a causal link between
3 Mexico's duty of care standard and the corporate decision to do business there. The
4 parties do not specifically address this principle, and without evidence supporting
5 such an assumption, this factor has little relevance to the Court's analysis.

6 (b) the relevant policies of the forum

7 With respect to Nevada's interest, the relevant inquiry is whether the
8 purposes sought to be achieved by Nevada's negligence and wrongful death laws
9 would be furthered by its application to out-of-state facts. Apart from the fact that
10 Nevada is the location of the action, Nevada has an interest in protecting the rights of
11 its citizens to recover adequate compensation for the wrongful death of their relatives
12 in foreign lands.

13 Here, the family bringing the action is domiciled in Nevada, and Decedent
14 was domiciled in Nevada. Additionally, Defendant Pacific Monarch Resort Inc.
15 ("PMRI") contacted Decedent and her boyfriend to inquire about their interest in the
16 new resort in Cabo. Decedent and her boyfriend subsequently upgraded their time
17 Share Agreement in order to visit the new resort in Cabo. Thus, the relationship that
18 resulted in Decedent and her boyfriend going to Cabo Azul Resort arose in Nevada.

19 (c) the relevant policies of other interested states and the relative interests
20 of those states in the determination of the particular issue

21 According to the Comments following the Restatement § 6, generally, "it is
22 fitting that the state whose interests are most deeply affected should have its local
23 law applied." Additionally, "[t]he content of the relevant local law rule of a state
24 may be significant in determining whether this state is the state with the dominant
25 interest."

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1 Mexico has a legitimate interest in determining the consequences of actions
2 taken by residents and corporations within its borders that cause injury. However,
3 Mexico also has a general policy to limit the liability of its resident defendants in
4 wrongful death actions. See Schoenberg v. Exportadora de Sal, S.A. de C.V., 930
5 F.2d 777, 783 (9th Cir. 1991). Thus, Mexico's interest in protecting its residents
6 from what it may consider excessive liability to foreigners for actions occurring on
7 Mexican soil is at odds with Nevada's interest in compensating its residents for their
8 losses.

9 (d) the protection of justified expectations

10 According to the Comments following the Restatement § 6, "it would be
11 unfair and improper to hold a person liable under the local law of one state when he
12 had justifiably molded his conduct to conform to the requirements of another state."
13 However, "in the area of negligence, when parties act without giving thought to the
14 legal consequences of their conduct or to the law that may be applied . . . the parties
15 have no justified expectations to protect, and this factor can play no part in the
16 decision of a choice-of-law question." Plaintiffs agree that the Court should apply
17 relevant Mexican building codes to the property in question.

18 (e) the basic policies underlying the particular field of law

19 According to the Comments to the Restatement § 6, "[t]his factor is of
20 particular importance in situations where the policies of the interested states are
21 largely the same but where there are nevertheless minor differences between their
22 relevant local law rules." Because the parties do not specifically address this
23 principle and it seems that Mexican and Nevada law may not have similar policies,
24 this principle is not influential in the Court's analysis of this action.

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1 (f) certainty, predictability and uniformity of result

2 The principle of certainty, predictability, and uniformity of result seems to
3 yield the same types of conclusions as the consideration of the justified expectation
4 principle. The injury occurred in Mexico and it is reasonable that the law where the
5 injury occurred would apply.

6 (g) ease in the determination and application of the law to be applied

7 According to the Comments following the Restatement Second Conflicts of
8 Law § 6, "[i]deally choice-of-law rules should be simple and easy to apply."
9 However, "it is obviously of greater importance that choice-of-law rules lead to
10 desirable results." Because the parties agree that Mexican building codes should
11 apply, a legitimate question is presented whether it may be easier also to apply
12 Mexican duty of care standards.

13 Although Nevada has not specifically addressed this issue, in applying the
14 Restatement , courts that have been faced with a similar factual scenario as the one
15 before this Court have found that other states had a more significant interest than the
16 forum where the accident took place. See Judge v. American Motors Corp., 908
17 F.2d 1565, 1566-1567, 1572 (11th Cir. 1990) (finding either Florida or Michigan law
18 applied even though the decedent was killed in Mexico because none of the plaintiffs
19 or defendants are Mexican residents and thus the application of Mexico's wrongful
20 death rule would not further the economic purpose underlying the rule); Kinnett v.
21 Sky's West Parachute Center, Inc., 596 F. Supp. 1039, 1040 (D. Colo. 1984) (finding
22 that Wyoming wrongful death law applied even though the plane crash occurred in
23 Colorado because the decedent purchased a ticket in Wyoming from a corporation
24 doing business there, for a trip that would begin and end in Wyoming); Knoell v.
25 Cerkvenik-Anderson Travel, Inc., 891 P.2d 861, 863, 867 (Ariz. App. 1994) (in a
26 wrongful death action against a tour company where the

1 decedent died in Mexico, the court found Arizona law applied to the tort action
2 because the defendant company was "headquartered in Arizona and doing business
3 in Arizona and Mexico, and the alleged misrepresentations were made, the
4 reservation was accepted, and money was paid in Arizona." Additionally, the Court
5 found Arizona had an interest in compensating its resident survivors); Trailways, Inc.
6 v. Clark, 794 S.W.2d 479, 482, 486 (Tex. App. 1990) (in wrongful death action
7 arising out of a Mexican bus accident, the court found Texas had a greater interest
8 than Mexico because the relationship between the decedents and the defendants
9 originated in Texas); Reich v. Purcell, 432 P.2d 727, 728, 731 (Cal. 1967) (in a
10 wrongful death action arising out of a collision in Missouri, the court found
11 California had a greater interest than Missouri because wrongful death actions are
12 concerned with how survivors should be compensated and "[t]he state of the place of
13 the wrong has little or no interest in such compensation."); but see Spinozzi v. ITT
14 Sheraton Corp., 174 F.3d 842, 843-44, 845 (7th Cir. 1999) (court found Mexico law
15 applied in negligence action where Illinois resident seriously injured himself in
16 Mexico. In so holding, the court reasoned that permitting each guest to carry with
17 him the tort law of his state or country "would disservice the general welfare because
18 it would mean that Mexican safety standards (insofar as they are influenced by tort
19 suits) were being set by people having little stakes in those standards.").

20 Here, many of the principles cut evenly between applying Nevada and
21 Mexican law. However, the court in Kinnett, Knoell, and Trailways found that the
22 location where the relationship arose was a factor significant enough to tip the scales
23 in favor of the decedent's forum state over the location of the injury. Additionally,
24 even though the court in Spinozzi found that advertising alone was not sufficient to
25 overcome Mexico's interest in having the law where the injury occurred apply, here

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1 the relationship between Plaintiff's and the Defendants is more significant than mere
2 advertising.

3 In sum, the Court finds that it is premature to fully determine the choice-of-law
4 questions posed in Defendant's Motion, or to finally resolve the forum non conveniens
5 issue. Although Plaintiffs have provided affidavits regarding the nature of the
6 relationship between the Decedent, her boyfriend, and Defendants, more discovery
7 on the relationship between PMRI the corporation Plaintiffs dealt with in Nevada,
8 and Cabo Azul Resort will be helpful in finally determining choice-of-law issues.
9 So too will complete discovery concerning the relationship between Cabo Azul
10 Resort and PMRI.

11 **IT IS THEREFORE ORDERED that** Defendant's Motion to Dismiss
12 Based Upon the Doctrine of Forum Non Conveniens, and Motion to Establish Choice of
13 Law (Doc. #28) is **DENIED** without prejudice.

14 **IT IS FURTHER ORDERED that** the parties shall have to and including
15 **September 20, 2010**, within which to file a joint discovery plan and scheduling
16 order which will enable the parties to expeditiously proceed with discovery.

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18 DATED: August 27, 2010.

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PHILIP M. PRO
22 United States District Judge
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